

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of)	
)	
Petition for Declaratory Ruling)	DA 05-2680
Regarding Self-Certification)	WC Docket 05-283
of IP-Originated VoIP Traffic)	
)	

COMMENTS OF JOINT CLEC COMMENTERS

NuVox Communications, XO Communications, and Xspedius Communications, Inc. (“Joint CLEC Commenters”), by their attorneys and in accordance with the FCC’s Public Notice, DA 05-2680, released on October 12, 2005, hereby submit comments in support of the Petition for Declaratory Ruling filed by Grande Communications, Inc. (“Grande”).¹

INTRODUCTION

The *Grande Petition* comes at a critical time and provides an important opportunity for the Commission to clarify certain aspects of the exemption from access charges applicable to enhanced service providers (“ESPs”). In the past few years, competitive local exchange carriers (“CLECs”) such as the Joint CLEC Commenters, are increasingly in the cross-fire of adversaries in an ever-warming controversy regarding IP-enabled services and the extent to which access charges are applicable to them. Although the Commission is planning to address these and other important issues regarding IP-enabled services in its *IP-Enabled Services Proceeding*,² at least several incumbent local exchange carriers are not waiting for results. Instead, they are actively

¹ Petition for Declaratory Ruling of Grande Communications, Inc., WC Docket 05-283, October 3, 2005 (“Grande Petition”).

² *In the Matter of IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶¶ 61-62 (2004) (“IP-Enabled Services Rulemaking”).

pursuing access charges in a plethora of situations. Some ILECs have even begun to automatically assume that a CLEC is at fault as a co-conspirator simply on the evidence that the CLEC provided local business services to an entity presenting itself as an ESP entitled to the access charge exemption, but whom the ILEC believes is actually an interexchange carrier or other entity subject to access charges. The reality of CLECs' experience is quite different, not surprisingly, and the *Grande Petition* points to the heart of the matter. Deciding the *Grande Petition* expeditiously will allow the Commission to clear the air of some of the accusation and insinuation which has been polluting the atmosphere in the telecommunications industry.

The *Grande Petition* seeks a ruling that, where a local exchange carrier ("LEC") receives a certification from a customer (or would-be customer) that the customer is an ESP or that the traffic the customer will send is enhanced, VoIP-originated traffic ("Certified Traffic") and where the LEC has no information to conclude that the certification is inaccurate, the LEC:

- (i) may offer that customer local business services pursuant to the enhanced services access charge exemption; and
- (ii) may send the traffic generated over those local business services destined for an end user of another LEC as local services traffic over local interconnection trunks it has with that LEC for transport and termination.³

Grande also seeks a ruling that, where a LEC receives such a certification, other LECs receiving the customer's traffic from the LEC holding the certification are to treat the traffic as local traffic for intercarrier compensation purposes and may not assess access charges on such traffic, unless

³ *Grande Petition* at i, 25. As such, the terminating LEC would be entitled to compensation under whatever Section 251(b)(5) arrangement the two LECs have reached for completing local traffic.

the Commission decides otherwise in the *IP-Enabled Services* or *Intercarrier Compensation* rulemakings or in another proceeding.⁴

The Joint CLEC Commenters urge the Commission to grant the *Grande Petition*. As explained below, the requested rulings are both consistent with and support current policy and law surrounding the ESP access charge exemption and would provide necessary guidance to resolve an increasingly common type of conflict between CLECs and ILECs. In addition, the Commission should take the opportunity to explain the ramification of a carrier or other person that seeks to challenge a LEC's ability to rely upon a customer self-certification of the type presented in the *Grande Petition*, namely that such challenger bears the burdens of proving both that the certification is invalid and that the LEC had reason to conclude that the customer's certification is invalid.

ARGUMENT

CLECs receive numerous requests for services on a continual basis. Within the constantly evolving communications and information services marketplace, it is not uncommon for a customer (or would-be customer), representing itself as an ESP or provider of information services to approach a CLEC with a request for local services, such as Primary Rate Interface services, to enable the ESP/information service provider to deliver its enhanced traffic to end

⁴ *Id.* See also *IP-Enabled Services Rulemaking, supra*; *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9613 (2001). What is *not* at issue in the *Grande Petition* is the situation where a CLEC receives no certification. Thus, the Commission should limit its ruling to the implications of when a CLEC *does* receive a certification, and leave for another proceeding, such as the *IP-Enabled Services Rulemaking*, a CLEC's rights or obligations when it provides local business services to a customer who, whether known to the CLEC or not, provides services or generates traffic that the customer presents as enhanced service traffic. See *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, ¶ 38 (2005) (declining to address multiple factual variants in the declaratory ruling apart from those originally proposed in the petition and instead intending to address those variants through a notice of proposed rulemaking).

users. It is also not uncommon for a customer to represent to a CLEC that the traffic that will be generated over the local business services is enhanced services traffic entitling it, therefore, to purchase local business services under the enhanced service access charge exemption.

This is the very factual scenario Grande presents in its *Petition*. It is one arising with increasing frequency, as Grande relates, and as the Joint CLEC Commenters described in their comments on the recent *SBC* and *VarTec* petitions for declaratory ruling.⁵ The Joint CLEC Commenters support the *Grande Petition*, because it seeks practical rulings from the Commission about how the enhanced services exemption is to be implemented. Such guidance is needed so as to not undermine the enhanced service exemption, which has promoted and continues to promote the development of innovative enhanced and information services, just as the Commission intended.⁶

The *Grande Petition* asks the Commission to address a very practical need for guidance on the part of, not just CLECs, but all LECs. Unlike the April 2004 *AT&T Declaratory Ruling* proceeding,⁷ the *pulver.com* ruling from the same month,⁸ or even the recent and pending *SBC* and *VarTec* petitions for declaratory ruling,⁹ the *Grande Petition* does *not* seek guidance on the regulatory classification of a certain type of traffic scenario, and whether access charges apply to

⁵ *Grande Petition* at 7-9; See *Comments of Joint CLEC Commenters*, WC Docket No. 05-276, at 4-5 (Nov. 10, 2005).

⁶ If the Commission is to modify or limit the long-established exemption, it can do so only in a rulemaking, such as the pending *IP-Enabled Services Rulemaking*, in which it fully explains its reasons for the regulatory change.

⁷ *Petition for Declaratory Ruling that AT&T's IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004).

⁸ *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307 (2004).

⁹ Public Notice, *Pleading Cycle Established for SBC's and VarTec's Petitions for Declaratory Ruling Regarding the Application of Access Charges to IP-Transported Calls*, DA 05-2514, WC Docket No. 05-276 (Sep. 26, 2005).

that service. Of course, the Joint CLEC Commenters suspect that other commenters will try to characterize the *Grande Petition* that way. Instead, the *Grande Petition* presents the more circumscribed question as to whether a LEC can rely on a customer self-certification, leaving unanswered whether the factual assertions of the certification are correct or not. Significantly, the *Grande Petition* limits the ability to rely where the LEC has information that would cause the LEC to conclude that the certification is not accurate. In other words, to set forth one example, if a potential customer, whom the LEC understands to provide a particular type of service that falls within a category the FCC has found to be a telecommunications service, requests a local business service, the LEC would be unable to rely upon a certification that the service is enhanced.

In those situations in which a LEC has been presented with a request for local services from an ESP based on the certification that the traffic in question is enhanced services traffic, and the LEC has no knowledge to conclude the certification is inaccurate, the Joint CLEC Commenters agree with Grande that the LEC should be permitted to rely upon that certification as long as it has no reason to conclude that the certification is inaccurate. The reasons for permitting LECs to rely on certifications for the purposes described above are manifold. As an initial matter, LECs have never been required to assume a policing role over their customers. The law and the Commission's regulations contain no affirmative obligation for a LEC, whether CLEC or ILEC, to conduct an investigation into every customer that requests its business services, whether it be a PRI or other local offering. Rather, the customer, by requesting a LEC's service, is making a representation that it is eligible for the service in question and that it will not use the service for an illegitimate purpose, such as improperly evading access charges that would otherwise be due to originating and terminating LECs.

The resources required for a LEC to perform a gate keeping function respecting its existing and potential business service customers would be tremendous. To the knowledge of the Joint CLEC Commenters, no ILEC performs such a function in accepting services from its customers. Instead, the ILECs rely upon the provisions within their tariffs and contracts to take action against any customer that they later discover is not eligible for the services which it purchased or is using its services to advance an illegitimate objective. CLECs, of course, should have no greater burden, and the rulings that Grande seeks will ensure that result in a specific set of circumstances.¹⁰

If a LEC is *not* permitted to rely on a certification from its customer, as the *Grande Petition* requests, the LEC will face the option of either conducting a burdensome investigation into every customer making a request for local services or simply declining service. Without addressing the LEC's ability to decline service under, for example, Sections 201 and 202 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 201 and 202, ESPs and information service providers would be deprived the benefits of the access charge exemption.¹¹ Customers would be hampered in their ability to have service orders quickly and efficiently completed. The effect would be a chill on the development of enhanced services, undermining the policies that underlie the exemption. If, as a result, continued growth in the information and enhanced services industries is slowed, businesses and consumers would suffer. This sort of outcome is

¹⁰ The *Grande Petition* addresses the scenario *where* a CLEC receives a certification from its customer. The *Grande Petition* does *not* seek a ruling that receipt of such a certification is required before the benefits of the enhanced services provider exemption, the ability to order local business services, is extended to the customer. In any event, the creation of such a requirement in response to the *Grande Petition* would be procedurally improper. Such a requirement could only be promulgated after a notice and comment rulemaking.

¹¹ As the *Grande Petition* noted, where a LEC receives such a certification, it is obligated, as a common carrier, and under the Commission's enhanced services exemption to provide the requesting customer the local business services it seeks. *Grande Petition* at 19.

untenable and is inconsistent with current law and policy. The rulings sought in the *Grande Petition* should be granted expeditiously.

The FCC, in granting the *Grande Petition*, should also explain and confirm what the Joint CLEC Commenters believe is the resulting ramification for any LEC or other entity that seeks to impose some sort of liability on the LEC who serves the customer providing the certification, whether that liability is in the form of access charges or tort. In particular, the rulings *Grande* requests would, by their terms, allow a LEC to rely upon the certification in provisioning local services and treating the traffic as local, for all purposes, and therefore exempt from access charges. Accordingly, any attempt to render the LEC's reliance invalid, and thereby impose some sort of liability on the LEC, would require the challenger to meet two burdens.¹² First, the challenging party would have to show, in fact, that the certification is invalid, *i.e.*, depending upon the exact certification, this would mean proving that that the customer is not an ESP or that the traffic is not enhanced services traffic. The burden of showing this should never fall on the LEC receiving the certification, or it would render the ruling sought by the *Grande Petition* completely meaningless. If the burden fell on the LEC, either sooner or later the LEC receiving the certification would have to make an investigation, which is unsound from a policy perspective and inconsistent with industry practice, as discussed above.

Second, the challenging party would also have to show that the LEC receiving the certification had reason to conclude that the certification was inaccurate. If the burden were on

¹² Just as the *Grande Petition* constricts the Commission to consider the situation *where* a LEC receives a certification, the attendant clarification which the Joint CLEC Commenters request here is independent of the question where the burdens should lie in the *absence* of a certification. By seeking the clarification regarding burden of proof where there is a certification, the Joint CLEC Commenters do not mean to suggest that a certification is required in order for the burden to lie with a LEC seeking to impose liability on another LEC who serves a customer through local services whose traffic the first LEC believes is subject to access charges. In the end, that is not a matter to be addressed or decided in this docket.

the LEC to prove that it had no reason to conclude that the certification was inaccurate, it would not only have to prove a negative, but that LEC, to protect itself, would still have to conduct an investigation. Rather, in order to invalidate the LEC's reliance and impose liability,¹³ the challenging LEC, which would normally be in the role of a plaintiff or petitioner, would have to make that demonstration, through discovery regarding the LEC's state of knowledge regarding the customer in question or its services as well as presenting its position on the current law concerning the nature of the services in the particular case.

This second point raises the subsidiary question of what it means for a LEC to have "reason to conclude" that a certification is inaccurate. This matter warrants guidance by the Commission if it grants Grande's request. This term should mean more than a possible suspicion that a customer may not be an ESP or that its traffic is not enhanced. It also requires more than knowledge that an aggressive ILEC seeking access charge revenue takes the position in Commission proceedings that services similar to those of a certifying customer are interexchange telecommunications services otherwise subject to access charges. Rather, the Commission should make clear that "reason to conclude" reflects a more objective criterion, namely (i) that the LEC knows enough about the customer's services or offerings, and (ii) that *current* law and rulings by the Commission regarding the classification of services of the type being offered by the customer is sufficiently clear that *the LEC must reasonably conclude that the Commission has already ruled that this type of service is not enhanced*. The LEC should not, consistent with current law and industry practice, have an affirmative obligation to investigate the customer and

¹³ The Joint CLEC Commenters are not requesting, nor in this docket would it be proper for, the Commission to rule what the liability of a LEC may or may not be if the challenging party can, in fact, demonstrate that the certification was inaccurate and that the LEC receiving it had reason to conclude it was inaccurate. That is a matter that must be left to the particular case in which the challenge is made.

its services. Nor should the LEC, before it can rely on the certification, have a duty to predict, after conducting that factual investigation into the service, what the result would be if the service was placed before the FCC with the question of whether the service is an enhanced or telecommunications service *if existing FCC precedent leaves the question reasonably uncertain*.

CONCLUSION

The Joint CLEC Commenters support an expeditious grant of the *Grande Petition*. A ruling confirming that, where a LEC receives a certification that a customer is an ESP and/or the traffic the customer will generate is enhanced services traffic, the LEC may rely upon the certification to provide the customer with local services and to treat the customer's traffic as local is consistent with current law and the access charge exemption in particular, provided the LEC does not have reason to conclude the certification is inaccurate. Such a ruling also would add certainty to the role of a LEC in offering services to ESPs under the access charge exemption, would help ensure ESPs have access to the local services to which they are entitled under the exemption, would actively further the Commission's goal of encouraging the development of enhanced and information services, and would be consistent with industry practice. At the same time, the ruling would not jeopardize the rights of a LEC or other person that seeks to pursue access charges or impose liability on a LEC receiving and relying on such a

certification, *provided* access charges are legitimately due on the traffic in question and the LEC or other person attempting to impose that liability meets its burdens of proof vis-à-vis the LEC receiving the certification.

Respectfully submitted,

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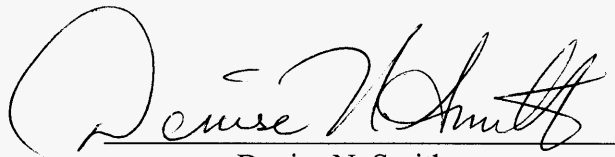
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December 12, 2005

CERTIFICATE OF SERVICE

I, Denise N. Smith, hereby certify that on this 12th day of December 2005, copies of the foregoing **“Comments of Joint CLEC Commenters”** were: 1) filed with the Federal Communications Commission via its Electronic Comment Filing System; 2) served, via e-mail, on Jennifer McKee, Pricing Policy Division, Wireline Competition Bureau at jennifer.mckee@fcc.gov; and 3) served, via e-mail, on Best Copy and Printing, Inc. at fcc@bcpiweb.com.

A handwritten signature in black ink, appearing to read "Denise N. Smith", written over a horizontal line.

Denise N. Smith